82-917

No. ..-...

IN THE

Supreme Court of the United States

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October Term, 1982

KENNETH CORY, Controller of the State of California; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioners,

vs.

LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.

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Questions Presented.

1. Whether a state constitutional amendment designed to equalize the compensation of judges performing the same duties on the same court is a law impairing the obligation of contracts in violation of article I, section 10 of the United States Constitution.

2. Whether a state constitutional amendment in November 1980, designed to equalize the compensation of judges after a State Supreme Court opinion created various pay categories dependent on terms of office, deprived judges whose pay formula was modified by the Legislature in 1976 and restored by the State Supreme Court in May 1980 of a vested contractual right in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Parties to the Proceeding.

The caption of the case contains the names of all parties.

Petitioners are the California State Controller who issues state warrants to state judges and the Board of Administration of the Public Employees' Retirement System which administers the benefits under the Judges Retirement Law. (Cal. Gov. Code, § 75005.)

Respondents are active or retired California Appellate Justices. The litigation was commenced as a class action on behalf of justices of the California Court of Appeal and Supreme Court justices whose salaries were adjusted in January 1981 by reason of the constitutional amendment in November 1980. Because a class action would have delayed a final decision, and a judgment of invalidity would benefit all affected judges, the action was dismissed as to all class members except the named parties.

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LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.

Petitioners Kenneth Cory and Board of Administration of the Public Employees' Retirement System, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Five, filed on June 25, 1982 and modified on July 22, 1982.

Opinion Below.

The opinion of the California Court of Appeal appears as Appendix A hereto.

The California Supreme Court denied a petition for hearing on September 8, 1982. (Appendix B.)

Jurisdiction.

This petition for writ of certiorari was filed within 90 days of the denial of discretionary review by the State Supreme Court. The petition is timely. (28 U.S.C. § 2101(c); *Amer. Ry. Exp. Co. v. Levee* (1923) 263 U.S. 19.) This court's jurisdiction is invoked under 28 United States Code section 1257(3).

State Constitution and Statutory Provisions Involved.

California Constitution, article VI, provides:

> "SEC. 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8 and 12 years.
>
> "....
>
> "(c) Terms of judges of superior courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.
>
> "....

"The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies.

"SEC. 19. The Legislature shall prescribe compensation for judges of courts of record.

"SEC. 20. The Legislature shall provide for retirements, with reasonable allowance, of judges of courts of record for age or disability."

California Government Code sections 68200-68210 provide for the compensation of justices and judges of courts of record. Sections 68200-68202 provide for a specified *annual* salary for the Chief Justices, Associate Justices of the State Supreme Court, Justices of the Court of Appeal, superior court and municipal court. Government Code section 68203 provides for modification of the specified annual salary.

Government Code section 68203, as amended in 1969, provided as follows:

"In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year."

Section 68203 was amended in 1976, effective January 1, 1977 to provide:

"On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%)."

Section 68203 was amended in 1979, effective January 1, 1980, as follows:

"On July 1, 1980, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California State employees but not to exceed five percent, provided, however, that if in either of the two previous fiscal years the average salary increase for state employees was less than five percent, the judges or justices shall in addition receive that portion of a current increase in excess of five percent which they would have been entitled to had the increases in the two previous fiscal years each been equal to five percent.

"(b) For the purposes of this section, salary increases for state employees shall be such increases as reported by the California Office of Employee Relations.

"(c) The salary increase for judges and justices made on July 1, 1980, for the 1980-81 fiscal year, shall in no case exceed five percent."

Statement of the Case.

California judges first assume office through election or appointment. The appointee appears on the ballot at the first general election at which the appointee had a right to become a candidate. Once elected, the term of an appellate court judge is 12 years and superior court judge is 6 years. (Cal. Const., art. VI, § 16.)

Since 1964, the amount of annual judicial salaries has been prescribed by California Government Code sections 68200-68202, subject to increases as provided in Government Code section 68203.

In 1969, the State Legislature granted judges an automatic annual pay increase based on the consumer price index. In 1976, effective January 1, 1977, the Legislature placed a five percent (5%) annual limit on cost of living increases.

The pension to which retired judges and spouses of deceased judges were and are entitled is a percentage of the salary payable at the time payment of the pension falls due to the judge holding the judicial office to which such retired or deceased iudge was last elected or appointed. (Gov. Code, §§ 75025, 75032, 75034.1.)

On March 27, 1980, as modified on May 30, 1980 and June 27, 1980, the California Supreme Court rendered its decision in *Olson v. Cory* (1980) 27 Cal.3d 532 [636 P.2d 532] (hereinafter *Olson v. Cory I*) holding that the 1976 amendment of Government Code section 68203 could not constitutionally be applied to (i) judges during any term or any unexpired term of a predecessor judge if some portion of such term (a "Protected Term") was served prior to January 1, 1977; and (ii) judicial pensioners whose benefits are based on some proportionate amount of the salary for the office of such judge. In said decision, the Supreme Court further held that all sitting judges have contractual rights

during their terms of office to the compensation provided by law at the commencement of the term which rights are protected from impairment by the State and Federal Constitutions and article III, section 4 of the California Constitution as then in effect. The Supreme Court further noted that its decision would create a disparity in salaries within a peer group of judges, and that "[s]uch disparity will continue, in the case of trial judges, no later than the first Monday in January 1981 and, in the case of appellate justices, no later than the first Monday in January 1987."

The State Legislature then voted to place a state constitutional amendment before the people in November 1980. The state constitutional amendment was intended to eliminate the disparity in judicial compensation depending upon term. As the ballot pamphlet described the change:

> "Because of the court's ruling, there is now a two-tier salary structure for judges, one based on the 1976 law and a higher one based on the 1969 law. Thus, as of January 1981:
>
> "Four associate judges of the Supreme Court will be paid $88,685 annually, while the other two associate judges will be paid $72,855.
>
> "Twenty-three judges of the courts of appeal will be paid $83,143, while the other 36 judges of these courts will be paid $68,303.
>
> "As their terms expire, the base salaries of the judges receiving these higher amounts will be reduced to the same levels as those paid to the other judges whose salary increases are limited to 5 percent annually.
>
> "Pensions of certain retired judges and their survivors also increased as a result of the Supreme Court's ruling, because pension benefits are tied to active judges' salaries. Generally, a retired judge receives an allowance equal to either 65 percent or 75 percent of

the current salary paid to the judge holding the office to which the retired judge was last elected.

"Proposals:

"This measure would amend the State Constitution to produce the following effects:

"It would eliminate, effective January 1, 1981, the additional pay being received by each judge whose base salary was increased as a result of the Supreme Court's ruling.

"It would eliminate, effective January 1, 1981, the additional pension benefits being received by each retired judge (or survivor) as a result of the court's ruling."

On November 5, 1980, the People of the State of California amended article III, section 4 of the State Constitution to provide as follows:

"(a) Except as provided in subdivision (b), salaries of elected state officers may not be reduced during their term of office. Laws that set these salaries are appropriations.

"(b) Beginning on January 1, 1981, the base salary of a judge of a court of record shall equal the annual salary payable as of July 1, 1980, for that office had the judge been elected in 1978. The Legislature may prescribe increases in those salaries during a term of office, and it may terminate prospective increases in those salaries at any time during a term of office, but it shall not reduce the salary of a judge during a term of office below the highest level paid during that term of office. Laws setting the salaries of judges shall not constitute an obligation of contract pursuant to Section 9 of Article I or any other provision of law."

On December 31, 1980, 12 active and retired judges filed a class action in the Los Angeles Superior Court (sometimes referred to as *Olson v. Cory II*). The complaint was for (1) mandamus and injunctive relief and (2) declaratory relief

and injunctive relief. The complaint alleged that the Controller should disregard the November 1980 amendment to the State Constitution on the grounds that the State Constitution could not alter the pay structure in effect immediately prior to the election until the end of the "Protected Terms." The mandate cause of action alleged that the Controller's duty to disregard was compelled by the contract clause of the State and Federal Constitutions and the Supremacy Clause of the United States Constitution and the due process clause of the State and Federal Constitutions.

The second cause of action sought a declaration that the amendment to the State Constitution could not constitutionally deprive petitioners of their vested constitutional and property rights to no reduction in compensation during their terms of office and that the November 1980 amendment to article III, section 4, was unconstitutional on its face and as applied.

Respondents and defendants Kenneth Cory and Board of Administration of the Public Employees' Retirement System answered the petition and complaint. The answer denied that the article III as amended was in any way ineffective or invalid.

On January 27, 1981, respondents filed a motion for judgment on the pleadings. Petitioners responded with a motion for judgment on the pleadings and/or summary judgment. Respondents and defendants filed points and authorities in opposition to plaintiffs' motion.

On May 4, 1981, the court held that plaintiffs' Motion for Summary Judgment should be granted and defendants' Motion for Judgment on the Pleadings should be denied. The court then entered a "Declaratory Judgment" which provided in pertinent part:

"2. The Court declares that justices of the California Supreme Court and Courts of Appeal whose terms expire in 1983 or 1987 and judicial pensioners whose pension benefits are calculated based on the salaries of such justices have vested rights under the contract and due process clauses of the United States and California Constitutions to receive the compensation provided by law at the commencement of such terms or the terms of the justices on whose salaries such pension benefits are based, including the full cost of living increases provided by California Government Code Section 68203 prior to the amendment thereof effective January 1, 1977, until the expiration of their present terms or the earlier termination of their service for some other reason or, in the case of judicial pensioners, the expiration of the present terms of the justices on whose salaries such pension benefits are based.

"3. The Court declares that justices of the California Supreme Court and Courts of Appeal whose terms commenced in 1979, judges of the California Superior Courts and Municipal Courts whose terms commenced in 1977 and 1979 and judicial pensioners whose pension benefits are based on the salaries of such justices or judges have vested rights under the contract and due process clauses of the United States and California Constitutions to receive the compensation provided by law at the commencement of such terms or the terms of the justices or judges on whose salaries such pension benefits are based, including an annual cost of living increase not to exceed five percent as provided by California Government Code Section 68203 effective January 1, 1977, until the expiration of their present terms or the earlier termination of their service for some other reason or, in the case of judicial pensioners, the expiration of the terms of the justices

or judges on whose salaries such pension benefits are based."

Judgment was entered on May 6, 1981.

On appeal, the California Court of Appeal struck out the words "and California" and affirmed (2d Civil No. 63644). (*Olson v. Cory* (1982) 134 Cal.App.3d 85 [___ Cal.Rptr. ___].) The decision of the Court of Appeal was thus based solely on the ground that the state constitutional amendment as applied to some state appellate justices violates the United States Constitution.

A copy of the opinion of the Court of Appeal and modification on July 22, 1982, is attached hereto as Appendix A.

On September 8, 1982, the California Supreme Court denied a petition for hearing. (Appendix B.)

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

THE DECISION INVOLVED AN IMPORTANT QUESTION OF FEDERAL LAW.

In 1976, the State Legislature attempted to adjust prospectively the annual statutory compensation of state appellate justices. The State Supreme Court, in 1980, held that the legislative power to prospectively adjust compensation during a 12-year term was restricted by the State Constitution and the Constitution of the United States.

The People of the State of California, by constitutional amendment in November 1980 attempted to remove the compensation disparity created by the State Supreme Court in *Olson v. Cory I, supra*, 27 Cal.3d 532.

The state courts have now held that neither the Legislature nor the people can adjust the pay formula prospectively because to equalize salaries would impair contracts protected by the United States Constitution or deprive judges of vested contractual rights in violation of the due process clause of the Fourteenth Amendment. (Appendix A.)

Unless the court sets aside the decision of the state court, the State Legislature and the People of the State of California cannot prospectively adjust judicial compensation during a term of office. Thus, any statutory change can only be effective as each judge begins a new term after the legislative change.

The present and future salary disparity, based upon preliminary calculations, illustrate the unfairness of the decision. Associate Justices of the State Supreme Court were paid at an annual rate of $77,226 for September 1982. Should this court deny review, Associate Justice Mosk will be paid at an annual rate of $111,326 for September 1982. Justices of the Court of Appeal were paid at an annual rate

of $72,401 for September 1982. Should this court deny review, Justices Ashby and Hastings on the Second District, Division Five, will be paid at an annual rate of $104,369 for September 1982. Assuming a 10% annual increase in consumer price index each year, by September 1986, a Court of Appeal Justice (serving a protected term) would have a salary of approximately $153,000 and an Associate Justice of the Supreme Court (serving a protected term) would have a salary of $163,000.

The relationship between a state and its employees, officers and judges is a matter that peculiarly should rest with the people of that state unless there is a *clear* deprivation of vested rights. The relationship should not be *finally* determined by state court judges deciding under the Rule of Necessity (their own compensation in issue) in apparent conflict with relevant opinions of the United States Supreme Court.

There are also the implications for California and other states in amending statutes and constitutions relating to other public offices with fixed terms of office. Economic condition may require changes immediately, not 12 years later.

This case presents solely a question of federal law. There is no factual issue. The state court determination that there is a "contract" within the meaning of article I, section 10 of the United States Constitution is not binding on this court.

The resolution of this important question of federal law by the state court conflicts with *Dodge v. Board of Education* (1937) 302 U.S. 74; *Butler et al. v. Pennsylvania* (1850) 51 U.S. 402, 404; and the reasoning of *United States v. Will* (1980) 449 U.S. 200.

II.

THIS IS THE FIRST OPPORTUNITY TO PRESENT THE ISSUE TO THIS COURT.

The California Court of Appeal held that it was bound by the decision of the State Supreme Court in 1980 on issues falling within the Federal Constitution.

The decision of the State Supreme Court in 1980 (27 Cal.3d 532 [636 P.2d 532]) could not have been reviewed by this court at that time. The decision was clearly based on independent state grounds—that changing the pay formula prospectively was a reduction of "salaries" of state officers during their terms in violation of article III, section 4 of the State Constitution. This court will not review a state court judgment based upon an adequate and independent non-federal ground. (*Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 566.)

III.

THE EXISTENCE OF A CONTRACTUAL RELATION TO BRING A MATTER UNDER THE IMPAIRMENT OF CONTRACT PROHIBITION IS A FEDERAL QUESTION AND THE DECISION OF THE CALIFORNIA COURT OF APPEAL CONFLICTS WITH APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT.

The United States Supreme Court makes an independent determination whether there is a "contract" within the meaning of the United States Constitution. (*Dodge v. Board of Education, supra*, 302 U.S. 74, 79; *Russell v. Sebastian* (1914) 233 U.S. 195, 202.)

A. There Is No Contract Between the State and Its Judges Binding the State to a Pay Formula for a 12-Year Term of Office.

In considering whether a state statute impairs the obligation of a contract, "the existence of the contract and the nature and extent of its obligation become federal questions" (*Irving Trust Co. v. Day* (1942) 314 U.S. 556, 561) which are to be determined by "an appraisal of the statutes of the state and the decisions of its courts." (*Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95 at p. 100.) The burden of showing the unconstitutionality of a statute, of course, rests on the party which attacks its validity and every

legislative enactment carries a strong presumption of constitutionality (*Borden's Co. v. Baldwin* (1934) 293 U.S. 194, 209).

The principal function of a legislative body is not to make contracts but to make laws which delcare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy. Nevertheless, a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the state or its subdivisions with the protection of article I, section 10. (*Indiana ex rel. Anderson v. Brand, supra*, 303 U.S. 95 at p. 100.)

This case does not involve the circumstances of a contract in fact bargained for by the parties and couched in contractual terms such as in *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1 (covenants with holders of bonds issued by public authorities).

Generally, a statute will itself be treated as a contract when its language and the circumstances manifest a legislative intent to create private rights of a contractual nature enforceable against the state. In *Indiana, supra*, for example, the statute in question employed the term "contract" a total of 25 times, defining the relation of teachers to the school district and stating the conditions for a teacher's termination. Moreover, "[t]he tenor of the Act indicates that the word 'contract' was not used inadvertently or in other than its usual legal meaning" and prior decisions of the state's highest court interpreting that statute had uniformly held the rights created pursuant to it to be contractual in nature. (*Indiana, supra*, at p. 105.) Under those circumstances, the United States Supreme Court found that the obligation fell within the ambit of section 10 of article I.

On the other hand, certain types of legislative acts, including those fixing salaries and compensation, or setting the term and tenure of public officers, are not presumed to create a contract: "The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the Legislature shall ordain otherwise. . . . If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right." (*Dodge v. Board of Education, supra*, 302 U.S. 74, 79.)

See *United States Trust Co. v. New Jersey, supra*, 431 U.S. at p. 17, fn. 14.

The California statutes contain no words of contract. There is no hint in the statutes that the consent or agreement of any person is required for the statute to have its intended effect. The matter addressed by the statutes, payment of annual salary, is a usual term or condition of public employment or officer. Government Code section 68203 is the type of legislative acts that create no private contractual rights.

Nor did California case law prior to *Olson v. Cory, supra*, 27 Cal.3d 532 [636 P.2d 532], suggest that there was a contract that bound the state to a pay formula for a term of office.

Longshore v. County of Ventura (1979) 25 Cal.3d 14, 23 [598 P.2d 866] (right to compensation ripens into contractual obligation *only* upon performance of the work); *Miller v. State of California* (1977) 18 Cal.3d 808, 814 [557 P.2d 970] (terms and conditions of employment found by statute not by contract — therefore no deprivation of property to compel retirement); *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150 [82 P.2d 434] (reduction of net salary by

imposition of deduction of health benefits); *Coyne v. Rennie* (1893) 97 Cal. 590, 593 [32 P. 578] (salary specified in charter may be reduced, "[a]lthough the term and salary may be named in the charter, yet there is no contract for a stipulated time or price that is binding on the public"); *Pennie v. Reis* (1889) 80 Cal. 266, 269 [22 P. 176] (reduction of benefits permissible); *Miller v. Kister* (1885) 68 Cal. 142, 144 [8 P. 813] ("[I]t is well settled that salaried public offices, created by the legislature, are not held by contract . . . The legislature . . . may abolish them altogether, or impose upon them new duties or reduce their salaries").

The opinions of this court have clearly held that *prospective* adjustments in compensation do not impair a contract.

In *Dodge v. Board of Education, supra*, 302 U.S. 74, the Illinois Legislature compelled teachers to retire at specified ages and required an annual annuity of at least $1,500. Ten years later, a statute reduced the annuity to $500. The court's opinion provides in part:

> "The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature can not impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. The point of controversy is as to the category into which the Miller Law falls.
>
> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement

of disputed rights and defines its terms. *On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature.* This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right." (Emphasis added.) (302 U.S. at pp. 78-79.)

Accord: *Robertson v. Miller* (1928) 276 U.S. 174, 178-179; *Fisk v. Jefferson Police Jury* (1885) 116 U.S. 131, 133-134; *United States v. Fisher* (1883) 109 U.S. 143, 145.

In *Butler et al. v. Pennsylvania, supra*, 51 U.S. 402 at 416, the Legislature changed the pay of canal commissioners during their terms. The Supreme Court rejected the impairment of contract argument as follows:

". . . The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too

> are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being . . . shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense."

Thus, under the California statutes and the prior decisions of this court and the California Supreme Court (with the exception of *Olson v. Cory I*), there is no contract within the meaning of article I, section 10 of the United States Constitution binding the Legislature not to prospectively change the pay formula during the judicial term.

B. A Constitutional Amendment That Attempts to Eliminate a Disparity in Judicial Salaries Is Not Without a Rational Basis and Does Not Deprive Justices of Property Without Due Process of Law.

A State Legislature or the people through constitutional amendment do not deprive persons of liberty or property without due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality. See generally: *Moore v. East Cleveland* (1977) 431 U.S. 494, 542-551, White J. dissenting; (*Nebbia v. New York* (1934) 291 U.S. 502, 525). The ultimate determination is whether as enacted or applied (*Boddie v.*

Connecticut (1971) 401 U.S. 371, 379-380) the amendment is reasonable and proper or arbitrary and oppressive.

The amendment is reasonable. For the reasons previously expressed, there is no vested contractual right to a statutory formula for a term of office.[1]

Federal judges challenged a change in their pay formula. This court held that a salary increase for federal judges *vests* only when *a particular increase takes effect*. Therefore, Congress, acting before a particular increase takes effect, could modify a statutorily defined formula for annual cost of living increases in the compensation of federal judges. (*United States v. Will, supra*, 449 U.S. 200.)

Furthermore, the State Supreme Court in 1980 was interpreting state statutes in finding a "contract." Upon the amendment of a Constitution, those statutes inconsistent with the amendment became unconstitutional. (*Martello v. Superior Court* (1927) 202 Cal. 400 [261 P. 476] (abolition of the office of judge pro tempore by state constitutional amendment was not an unconstitutional impairment of the obligation of a contract as to such judge and parties litigant).)

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[1]The vested contractual rights of *pensioners* are dependent on resolution of validity of article III, section 4, as applied to *active judges*.

As Justice Clark noted in *Olson v. Cory, supra*, 27 Cal.3d 532 at pp. 541-542 [636 P.2d 532]:

> "Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired or deceased judge was last elected or appointed. (See *e.g.*, Gov. Code, §§ 75032, 75033.5, 7506.6, 75076, 75077, 75091, 75093, 75094, 75096, 75096.1, 75096.3.) Accordingly, a judicial pensioner cannot claim impairment of a vested right arising out of the 1976 amendment except when the judge holding the particular judicial office could also claim such an impairment. The resolution of pensioner vested rights, then, is dependent on the foregoing resolution of judges' vested rights left unimpaired by the 1976 amendment." (Accord: *Casserly v. City of Oakland* (1936) 6 Cal.2d 64, 69 [56 P.2d 237].)

It is not irrational for the people to equalize the salary of Associate Justices of the Supreme Court to avoid having one justice paid $111,326 and another justice $77,226. Nor did the United States Constitution require the people to increase all the salaries to $111,326 in order to equalize compensation.[2]

Conclusion.

For the foregoing reasons, the California Court of Appeal has decided a federal question in conflict with the applicable decisions of this court. The state court felt bound by a prior decision of the State Supreme Court that could not then be reviewed by this court. This court should *now* review the federal question by granting the petition.

Respectfully submitted,

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[2]The approximate monetary impact of the decision in terms of *back* pay from January 1, 1981 to December 31, 1982 is $965,000.